

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

ROBERT ROSS, Individually and On Behalf of All Others Similarly Situated,	:	No. 2:05-cv-00819-EAS-TPK
	:	(Consolidated)
	:	
Plaintiff,	:	
vs.	:	
	:	JUDGE SARGUS
ABERCROMBIE & FITCH COMPANY, <i>et al.</i> ,	:	MAGISTRATE JUDGE KEMP
	:	
Defendants.	:	

**SUR-REPLY MEMORANDUM OF DEFENDANT ABERCROMBIE & FITCH CO. IN  
OPPOSITION TO PLAINTIFF’S MOTION TO COMPEL SPECIAL LITIGATION  
COMMITTEE REPORT AND RELATED DOCUMENTS**

In its Reply Brief, Plaintiff contends that “the substance of what is contained in the Derivative Order is not the same information as Abercrombie publicly released.” Reply Brief at 4. That contention is incorrect. In fact, the two specific references to the SLC Report on which plaintiff relies each restate public information:

(a) Plaintiff cites the Court’s statement that “[t]he SLC found that Abercrombie publicly disclosed that its ‘clearance’ period for spring merchandise ‘was planned early’ and that the Company did not engage in promotional activities, in accordance with its public strategy.” *Id.*; Derivative Order at 16. In fact, Abercrombie explicitly had disclosed the early clearance sale information in its messages reporting May and June 2005 sales results. *See* Exhibit A (excerpts from Plaintiff’s Deposition Exhibit 108) (May 2005 and June 2005 sales release call scripts). The non-promotional strategy that Abercrombie was pursuing likewise was a matter of public record. *See* Exhibit B at [81] (transcript of conference call with analysts on February 15, 2005).

(b) Plaintiff also cites the Court’s statement that “[f]or example, the SLC found that Mr. Jeffries had been closed out of several previous trading windows, and traded in accordance

with his established trading pattern and in the keeping with his personal financial planning needs.” Reply Brief at 4; Derivative Order at 18. That information too was in the public domain. *See* Exhibit C (Wall Street Journal report) (Aug. 29, 2005).

Because the cited references to the SLC Report set forth public information, and not information protected by the attorney-client privilege or work product doctrine, the Court’s references to those statements in the Derivative Order provide no support for the argument that Abercrombie has waived the privilege and work product protections applicable to the SLC Report.

Respectfully submitted,

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By /s/ Philip A. Brown

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**CERTIFICATE OF SERVICE**

I served a copy of this memorandum upon the counsel listed on the attached service roster by electronic mail and first-class U.S. mail on September 29, 2009.

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